Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF FOR APPELLANTS

Henry A. Gempeler
City Attorney

Gerald C. Kops
Deputy City Attorney
545 West Dayton Street
Madison, Wisconsin 53703

On the Brief
John E. Rothschild
Assistant City Attorney
210 Monona Avenue
Madison, Wisconsin 53709

Legal Briefs Company, 2700 Laura Lane, Middleton, Wisconsin 53562

Page

ARGUMENT 1

I.

THE ARGUMENTS OF THE APPELLEE AND SUPPORTING *AMICUS* CONCEDE THE CONSTITUTIONAL IMPERFECTION OF THE ORDER AFFIRMED BY THE WISCONSIN SUPREME COURT 1

II.

THE ARGUMENT OF THE APPELLEE FAILS TO SUPPORT THE CONSTITUTIONALITY OF THE WISCONSIN SUPREME COURT HOLDING THAT A SCHOOL BOARD MUST REFUSE TO ALLOW EMPLOYEES OTHER THAN THEIR EXCLUSIVE BARGAINING REPRESENTATIVE THE OPPORTUNITY TO APPEAR AND SPEAK AT ITS REGULAR MEETINGS DURING THE PORTION OF THE MEETING DEVOTED TO PUBLIC COMMENT, SINCE TO ALLOW THE EMPLOYEE TO SPEAK WOULD MEAN THE BOARD WAS BARGAINING WITH OTHER THAN THE EXCLUSIVE REPRESENTATIVE OF ITS EMPLOYEES 5

Page

III.

THE DECISION OF THE WISCONSIN SUPREME COURT MUST BE REVERSED 11

CONCLUSION 14

TABLE OF CITATIONS

CASES CITED

Bell Bakeries (1951)
97 NLRB No. 233, 29 LRRM 1254 10

Beloit Education Association v. WERC (1976)
73 Wis. 2d 43, 242 N.W. 2d 231 3

Bishop v. Wood (1976)
— U.S. —, 96 S.Ct. 2074 6

Bishop and Malco, Inc. (1966)
159 NLRB No. 106, 62 LRRM 1498 10

Blackburn v. Alabama (1957)
354 U.S. 393 12

Byran Bros. Packing Corp. (1968)
161 NLRB No. 107, 63 LRRM 1468 10

Cherokee Sportswear, Inc. (1969)
172 NLRB No. 40, 72 LRRM 1059 10

Emporium Capwell Co. v. Western Addition Community Organization (1975),
420 U.S. 50 8,9,10

Fisher v. Walker (10th Cir. 1972)
464 F. 2d 1147 6

Page

Honeyman v. Hanan (1937)
300 U.S. 14 12

Hudgens v. NLRB (1976)
— U.S. — 96 S.Ct. 1029 4

Kelley v. Johnson (1976)
— U.S. — 96 S.Ct. 1440 6

Medo Photo Supply Corp. v. NLRB (1944)
321 U.S. 678 7

Minnesota v. National Tea Co. (1940)
309 U.S. 551 12

Missouri ex rel. Southern Railway v. Mayfield (1950) 340 U.S. 1 12

National Association of Letter Carriers v. Austin (1971), 418 U.S. 264 13

Nebraska Press Association v. Stuart (1976)
— U.S. — 96 S.Ct. 2791 4

Pickering v. Board of Education (1968)
391 U.S. 563 5,6,15

Standard Oil Co. v. Johnson (1942)
316 U.S. 481 12

State Tax Commission v. Van Cott (1939)
306 U.S. 511 12

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (1976), — U.S. — 96 S.Ct. 1817 4

Young v. Raegen (1949)
337 U.S. 235 12

Page

STATUTES INVOLVED

United States Statutes

29 USC

Sec. 157..... 8

Sec. 158 (a) (1)..... 8

Sec. 159 (a)..... 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF FOR APPELLANTS

I.

THE ARGUMENTS OF THE APPELLEE AND SUPPORTING *AMICUS* CONCEDE THE CONSTITUTIONAL IMPERFECTION OF THE ORDER AFFIRMED BY THE WISCONSIN SUPREME COURT.

The Appellee argues on Page 16 of its Brief:

> "If Holmquist had appeared before the Board and expressed his views regarding fair share or any other topic in his capacity as a citizen, rather than as a teacher and collective bargaining representative representing a dissident bargaining unit minority, he would certainly have been acting within his constitutional rights and without litigious consequences."

The problem with this argument is that the WERC order affirmed by the Wisconsin Supreme Court demands that the Appellant cease and desist from permitting *employees* other than representatives of Madison Teachers Incorporated to appear and speak on matters subject to collective bargaining between it and Madison Teachers Incorporated. Thus, the Board must refuse to allow *employees* the opportunity to appear and speak, even though the employee wished to, or would have, expressed his views in the capacity of a citizen, and therefore "would certainly have been acting within his constitutional rights." (Appellee's brief P. 16). It follows that the Appellee has at least tacitly conceded that the WERC order affirmed by the Wisconsin Supreme Court is unconstitutionally overbroad on its face.

The *amicus curiae* brief filed on behalf of the Appellee by the National Education Association (hereinafter NEA) also concedes the constitutional imperfection of the order affirmed by the Wisconsin Supreme Court. The NEA, in its brief, at Page 18, makes the following comment regarding the WERC order:

> "Unless the order is narrowed, however, the School Board will have no choice but to comply with its terms and refuse at any meeting to accept statements on subjects of collective bargaining from employees other than the Union representative. If the First Amendment requires equal access under any conceivable circumstances, this order will be unconstitutionally overbroad and will have the effect of denying legitimate opportunities to speak along with those that may be properly denied."

The brief filed in behalf of the Appellee by the American Federation of Labor and Congress of Industrial Organizations, (hereinafter AFL-CIO) speaks quite pointedly regarding the order affirmed by the Wisconsin Supreme Court and effectively summarizes the argument of the Appellant regarding the order. On Page 25 of their brief, the AFL-CIO *amicus* concludes ... "this order is palpably unconstitutional."

The Appellant contended in its initial brief that the order must be voided as constitutionally vague, since the prohibited subject matters are not clearly defined. Simply, a school board would have difficulty in locating the outer limits of the term, "matters subject to collective bargaining" when determining whether a speech was permissible or impermissible. The Wisconsin Supreme Court recently has addressed the issue of a definition of the term, "matters subject to collective bargaining". *Beloit Education Association v. WERC*, 73 Wis. 2d 43, 242 N.W. 2d 231 (1976). The decision recognizes the imprecise

nature of the term and thereby confirms the vagueness of the WERC order and insures that the order will have a chilling effect both on the rights of teachers to speak and school boards to listen on subjects arguably related to bargaining but directly concerned with the well-being of school children in the community.

Finally, the constitutional difficulties of the WERC order identified in the Appellant's brief, tacitly recognized by the Appellees and affirmatively recognized by *amicus* filing in behalf of the Appellee, have recently again been condemned by this Court. *Hudgens v. NLRB*, — U.S. —, 96 S.Ct. 1029 (1976) (content consorship in a public forum). *Nebraska Press Association v. Stuart*, — U.S. —, 96 S.Ct. 2791 (1976) (prior restraints on speech and publication as the most serious and least tolerable infringement of First Amendment rights). *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, — U.S. —, 96 S.Ct. 1817 (1976) (where a willing speaker exists, the First Amendment protection afforded is to the communication, to its source and to its recipients).

II.

THE ARGUMENT OF THE APPELLEES FAILS TO SUPPORT THE CONSTITUTIONALITY OF THE WISCONSIN SUPREME COURT HOLDING THAT A SCHOOL BOARD MUST REFUSE TO ALLOW EMPLOYEES OTHER THAN THEIR EXCLUSIVE BARGAINING REPRESENTATIVE THE OPPORTUNITY TO APPEAR AND SPEAK AT ITS REGULAR MEETINGS DURING THE PORTION OF THE MEETING DEVOTED TO PUBLIC COMMENT, SINCE TO ALLOW THE EMPLOYEE TO SPEAK WOULD MEAN THE BOARD WAS BARGAINING WITH OTHER THAN THE EXCLUSIVE REPRESENTATIVE OF ITS EMPLOYEES.

The Appellant has conceded in its initial brief that the right of free speech is not absolute. The Appellant has also conceded that the state has interests as an employer in regulating the speech of its employees that differs significantly from those that it possesses in conjunction with regulation of the speech of the citizenry in general. *Pickering v. Board of Education*, 391 U.S. 563 (1968). It is important, however, to clarify what was said and what was not said in *Pickering* regarding the interests of the state as an employer. A public employee, like a private sector employee,

may be discharged or disciplined in some cases for publicly criticizing his superior. If *Pickering* were such a case, the teacher's discharge could have been upheld. 391 U.S. at 569-570. See also *Fisher v. Walker,* 464 F. 2d 1147 (10th Cir. 1972). In other words, the First Amendment provides no special immunity for public sector employees against discipline by their superiors for sufficient cause. Further, public sector employees have no special Fourteenth Amendment rights from being discharged by their employer simply because their employer is an agent of the state. *Bishop v. Wood,* — U.S. —, 96 S.Ct. 2074 (1976), *Kelley v. Johnson,* — U.S. —, 96 S.Ct. 1440 (1976). So, while public employees, like private employees, may be disciplined for certain types of speech or conduct, *Pickering* emphatically reiterates that they may not be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public institutions in which they work. (See Brief for AFL-CIO as *amicus curiae,* P. 5.)

The labor relations area is also an area where the state has interests as an employer in regulating the speech of its employees. The Appellant has conceded that the prohibition against employers negotiating with other than the majority representative of its employees in a case where the employees have decided to organize is constitutional. The constitutional problem posed in this case occurs because the Wisconsin Supreme Court has defined, interpreted, and applied the

term "negotiation" to include merely allowing employees to speak at public meetings during the portion of the meeting devoted to public comment. It is the Appellant's position that this definition, interpretation and application of the term of negotiation is well beyond the permissible infringement of freedom of expression allowable pursuant to the labor relations principle of majority rule.

The Appellee has failed to cite any case which suggests that the Wisconsin Supreme Court definition of negotiations coincides with the permissible scope of First Amendment infringement allowed by the majority rule doctrine of labor-management relations.

The Appellant's initial brief discussed the case of *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678 (1944), and pointed out how that case was supportive of the Appellant's contention that bargaining or negotiating entailed much more than an employer merely listening to a speech of an employee. The Appellee cites the case but totally disregards the critical importance of the facts of that case as they define and illuminate the scope of the exclusivity doctrine, and specifically the type of direct dealing which constitutes impermissible negotiation with employees other than the exclusive representative. Therefore, the Appellant continues in its firm belief that the *Medo* case when viewed in the light of its facts supports the position of the Appellant.

The Appellee also contends that the case of *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975), supports the holding of the Wisconsin Supreme Court. The Appellant respectfully submits the Appellee is in error. In the *Emporium* case a group of employees refused to pursue claims of racial discrimination through the grievance-arbitration process established in the governing collective bargaining agreement. Instead, minority group employees picketed and organized a boycott of the employer in support of their "*demand that the* [*company*] *bargain with the picketing employees for the entire group of minority employees*". *Emporium,* supra, 420 U.S. at 57. (Emphasis supplied). The employer warned the group to cease and desist from their activities, and when the group continued, the employer discharged the employees.

The employees sought reinstatement claiming their discharge by the employer violated Section 8 (a) 1 of the National Labor Relations Act. The NLRB Hearing Examiner determined that the activity of the employees was not protected by Section 7 of the Act (29 USC §157), and that their discharge did not violate Section 8 (a) 1, (29 USC §158 (a) 1). The NLRB concluded that the protection of such an attempt to bargain by minority employees would undermine the statutory system of bargaining through an exclusive elected representative, impede the elected union's efforts at bettering working conditions of minorities, and

place on the employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under the agreement.

This Court, in deciding the *Emporium* case, emphasized that: "... It is important to have firmly in mind the character of the underlying conduct ..." involved in the case before applying labor policy. (*Emporium,* supra, 420 U.S. at 60). The Court determined that the issue was "... whether such attempts to engage in separate bargaining are protected by Section 7 of the Act or prescribed by Section 9 (a) (29 USC §159 (a))..." (*Emporium,* supra, 420 U.S. 61). This Court held such attempts were not protected and refused to set aside the employees' discharges.

The character of the underlying conduct in the case at bar clearly cannot be characterized as an attempt to engage in separate bargaining. Albert Holmquist's statement to the Board of Education recognized the validity and viability of the collective bargaining relationship between the Board and MTI. In fact, the Collective Bargaining Agreement recognized that the parties may receive petitions on negotiable subjects and specified a procedure for dealing with such a situation. (Appellant's Brief P. 6).

The *Emporium* case stands for the proposition that an employee demand that an employer bagain separately was not protected by the National Labor Relations Act. However, the Court did not hold that the employer was guilty of an unfair labor practice if he failed to take disciplinary action against an employee who made such a bargaining demand, but instead merely listened to such demand and remained silent. Yet Appellee is contending that that case supports the proposition that an employer is guilty of an unfair labor practice if the Board fails to prevent an employee from speaking to it on a matter subject to collective bargaining in the absence of the slightest evidence that the employee wished to bargain with the Board separately. The Appellant submits a comparison of the character of the underlying conduct in *Emporium* to that in the case at bar reveals that *Emporium* lends no support to the constitutionality of the Wisconsin Supreme Court decision.

Finally, the Appellee cites four NLRB cases to establish that an employer is responsible for the conduct of his employees. (*Bishop and Malco, Inc.* (1966) 159 NLRB No. 106, 62 LRRM 1498. *Byran Bros. Packing Corp.* (1968) 161 NLRB No. 107, 63 LRRM 1468. *Bell Bakeries* (1951) 97 NLRB No. 233, 29 LRRM 1254. *Cherokee Sportswear, Inc.* (1969) 172 NLRB No. 40, 72 LRRM 1059. See Appellee's Brief P. 23). The Appellant submits that these cases, when viewed in the light of their facts, also lend no support to the conclusion that the Appellant aided and abetted or was otherwise responsible for Albert Holmquist's activity.

A careful review of Appellee's Brief fails to reveal any case authority to support the constitutional validity of the Wisconsin Supreme Court's definition of negotiations. Instead the cases cited illustrate and highlight the dubious nature of the Wisconsin court's definition and hence its constitutional imperfection.

III.

THE DECISION OF THE WISCONSIN SUPREME COURT MUST BE REVERSED.

The Wisconsin Supreme Court has held that if a public body allows an employee other than the exclusive bargaining representative of its employees to speak at a public meeting on matters subject to collective bargaining, it commits a prohibited labor practice because it has negotiated with that employee in derogation of the employees' exclusive representative. The court expressly found no constitutional infirmity with such a definition of negotiation. The constitutional issue posed by this definition is squarely before the Court. The unfair labor practice is founded solely and squarely on the Board's permitting a teacher to speak at a public meeting. Yet the *amicus* briefs filed on behalf of the Appellee suggest that the matter be remanded to the Wisconsin Supreme Court for further proceedings.

However, the cases cited in the NEA *amicus* brief suggesting remand clearly demonstrate that a remand for further proceedings is inappropriate. The record in this case leaves no uncertainty as to

whether the court passed on Appellant's constitutional claim as was the case in *Blackburn v. Alabama*, 354 U.S. 393 (1957). The record in this case unlike the record in *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950), clearly establishes the basis of the Wisconsin Supreme Court decision. The record in this case clearly establishes that the decision of the Wisconsin Supreme Court does not rest on a valid non-Federal ground, and thus, subject to remand under the theory of *Young v. Raegen*, 337 U.S. 235 (1949). In this case, the Wisconsin Supreme Court has accomplished and completed a construction of the state labor law unlike the cases of *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) or *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939), so that this Court can and should determine whether the statute so construed and applied is repugnant to the Federal Constitution. The Wisconsin Supreme Court judgment is clear and unambiguous, and therefore appropriate for a dissertation on constitutional law unlike the record and decision in *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940). Finally, the record clearly shows the nature of the Federal question, how it was raised, and the grounds of its disposition, unlike the case of *Honeyman v. Hanan*, 300 U.S. 14 (1937). It follows that a remand of this case to the Wisconsin Supreme Court is not justified by any of the cases cited in the *amicus* brief filed by the NEA in behalf of Appellee.

Further, none of the cases cited in support of the remand request are cases involving free expression. This Court has accorded cases involving free expression a preferred place because of the core importance of free expression to the maintenance of our democratic system of government.

> "The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles of general application, but also to review the facts to insure that speech involved is not protected under federal law. We must 'make an independent examination of the whole record, '... so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *National Association of Letter Carriers v. Austin*, 418 U.S. 264 at 282 (1971) [Citations omitted].

Appellant submits that the record before this Court and the decision of the Wisconsin Supreme Court provides a sound basis for this Court to formulate principles of general application regarding the impact of the Wisconsin decision on our system of free expression so that this Court can assure itself that future judgments regarding the public sector labor relations environment will not constitute a forbidden intrusion in the field of free expression.

CONCLUSION

It appears that all parties and *amicus* who have filed briefs in this case for the Court's consideration concede that the order affirmed by the Wisconsin Supreme Court cannot stand. It is also clear that the argument of the Appellee fails to indict the primary contention of the Appellant that the Wisconsin Supreme Court definition of negotiation unconstitutionally intrudes on the rights guaranteed individuals and obligations imposed on governmental bodies by the First Amendment.

The posture of this case as currently before the Court, demands formulation of principles of general application so as to assure the judgments of the Wisconsin Supreme Court in the future will not constitute a forbidden intrusion on the field of free expression.

The Appellant respectfully suggests that a sound starting point for developing the principles of general application in the public sector labor relations environment will be the recognition that a public employer must be able to listen to any of its employees at public meetings open to public comment without having to be concerned that to do so would violate his duty to bargain solely with the employees' exclusive representative. It is the firm belief of the Appellant that establishment of such a principle is the only result which will promote sound public sector employment relations and preserve "free and unhindered debate on matters of

public importance — the core value of the Free Speech Clause of the First Amendment...." *Pickering v. Board of Education*, supra, 391 U.S. at 573.

Henry A. Gempeler
City Attorney

Gerald C. Kops
Deputy City Attorney
545 West Dayton Street
Madison, Wisconsin 53703

On the Brief
John E. Rothschild
Assistant City Attorney
210 Monona Avenue
Madison, Wisconsin 53709